

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RANI THYKKUTTATHIL and RYAN  
WELLMAN, wife and husband

Plaintiff,

v.

JAMES KEESE, III, and SARA KEESE,  
husband and wife, and their marital community  
composed; and PROGRESSIVE MAX  
INSURANCE COMPANY, a foreign insurer

Defendants.

No. C12-01749 RSM

**ORDER CLARIFYING FED.R.CIV.P. 30  
AND DENYING MOTION TO  
ENLARGE THE NUMBER OF  
ALLOWED DEPOSITIONS WITHOUT  
PREJUDICE TO RENEWAL**

**I. INTRODUCTION**

This matter is before the Court on defendant's motion seeking the Court's interpretation of Fed.R.Civ.P. 30(a)(2)(A) or, in the alternative, to enlarge the number of allowed depositions. Dkt. # 114. Defendant Progressive Max Insurance Co. ("Progressive"), joined by defendants Keese (Dkt. # 118), submits that Fed.R.Civ. P. 30(a)(2)(A) is ambiguous as to whether it permits ten depositions per party or per side. Progressive contends that, as defendants have already deposed or subpoenaed ten witnesses, they have "exhausted the ten depositions allowed under the rule, provided they are limited to ten per side and not ten per party." Dkt. # 120, p. 4. If this Court finds that Fed.R.Civ.P. 30 imposes a limit of ten

1 depositions per side, defendant seeks permission to expand the number of allowed depositions  
2 to sixteen. Defendant avers that this enlargement is necessary to “allow the deposition of both  
3 Plaintiffs, their nine experts, and five additional lay witnesses out of the more than thirty lay  
4 witnesses disclosed by the Plaintiffs.” Dkt. # 120, p. 2. Progressive has declined to provide to  
5 plaintiffs the identity of the additional witnesses to be deposed, citing the need for initial  
6 clarification of the alleged ambiguity in Fed.R.Civ.P. 30. *Id.* at p. 8.

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8 The Court has determined, for the reasons set forth below, that Fed.R.Civ.P.  
9 30(a)(2)(A) is unambiguous in limiting depositions to ten per side. As to defendant’s request  
10 to enlarge the number of allowed depositions, the Court denies this motion without prejudice  
11 to renewal.

## 12 II. DISCUSSION

13 This matter arises out of an automobile accident on June 23, 2009 in which plaintiffs  
14 Rani Thykkuttathil and Ryan Wellman, wife and husband, were injured by an automobile  
15 driven by James Keese, III. Plaintiffs filed this tort action in state court on June 22, 2011,  
16 naming James Keese, III and his wife Sara Keese as defendants. On September 20, 2012,  
17 plaintiffs moved for leave to amend their complaint to add additional defendants, namely the  
18 employers of defendant James Keese as well as the plaintiffs’ own insurer (defendant  
19 Progressive), under the Underinsured Motorist provision of their policy. After the state court  
20 granted plaintiffs leave to amend, defendant Progressive removed the action to this Court  
21 under the diversity jurisdiction provisions of 28 U.S.C. § 1332(a).  
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1 Defendants have thus far deposed or subpoenaed ten witnesses, including both  
2 plaintiffs, one lay witness, and seven experts. Dkt. # 120, p. 5. Progressive filed the instant  
3 timely motion on August 16, 2013, seeking clarification on the number of deponents allowed  
4 under Fed. R. Civ. P. 30(a)(2)(A), or, in the alternative, to expand the number of depositions  
5 that defendants may conduct to sixteen under Fed. R. Civ. P. 26(b)(2)(A). Dkt. # 114. The  
6 deadline for parties to complete discovery is September 16, 2013. Dkt. # 97.

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8 Plaintiffs contend that the instant motion suffers from procedural irregularity as  
9 Progressive failed to conduct a conference of counsel prior to filing, pursuant to Fed.R.Civ.P.  
10 37(a)(1). However, the Court finds that this motion is not subject to the meet-and-confer  
11 requirements imposed by Fed.R.Civ.P. 37(a)(1), which pertains exclusively to motions for  
12 orders compelling disclosure or discovery. As Progressive seeks clarification on a procedural  
13 rule, this meet-and-confer requirement is inapplicable. A motion for leave to conduct  
14 depositions in excess of Fed.R.Civ.P 30(a)(2) is also not subject to the meet-and-confer  
15 requirements of motions to compel.  
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17 Even if the meet-and-confer requirements were apposite, the Court finds that  
18 defendants have engaged in a “good faith” attempt to confer with counsel for plaintiffs. *See*  
19 LCR 37(a)(1). Defendant contacted counsel for plaintiffs on August 15, 2013 with a request  
20 for conference regarding this motion. Dkt. # 115-3. The request took place one day before the  
21 deadline set by this Court, in its Order Setting Trial Date & Related Dates (Dkt. # 97), for  
22 parties to file motions related to discovery. Though Progressive allowed regrettably little time  
23 for conference to take place, Progressive has provided a record of attempts by its counsel to  
24 conference with counsel for plaintiffs prior to filing. Dkt. # 115-3. Progressive certifies, and  
25 plaintiffs acknowledge, that conference of counsel did take place on August 19, 2013, one day

1 after the deadline for filing discovery motions. At that time, parties were unable to agree to a  
2 stipulation expanding the number of depositions beyond ten per side. Dkt. # 119, p. 2; Dkt. #  
3 120, p. 2.

4 As to the merits of Progressive's motion, the Court finds that as an initial matter  
5 Fed.R.Civ.P. 30(a)(2), as amended in 1993, is unambiguous in presumptively limiting the  
6 number of allowed depositions to ten per side, not per party. The rule provides that absent  
7 stipulation by the parties, "[a] party must obtain leave of court" to conduct a deposition if it  
8 "would result in more than 10 depositions being taken under this rule or Rule 31 by the  
9 plaintiffs, or by the defendants, or by the third-party defendants." The accompanying  
10 Advisory Committee Note clarifies that the ten deposition limit is to be construed as applying  
11 to each side. Fed.R.Civ.P. 30 Advisory Committee's Note (1993) ("Subdivision  
12 (a)...Paragraph (2)(A) is new. It provides a limit on the number of depositions the parties may  
13 take, absent leave of court or stipulation with other parties. One aim of this revision is to  
14 assure judicial review under the standards stated in Rule 26(b)(2) before *any side* will be  
15 allowed to take more than ten depositions in a case without agreement of the other  
16 parties.")(emphasis added). The ten-per-side limit is intended to promote cost-effective  
17 discovery and promote the federal rules' policy of minimizing "unreasonably cumulative or  
18 duplicative" discovery. Fed.R.Civ.P. 26(b)(2)(C); Fed.R.Civ.P. 30 Advisory Committee's  
19 Note (1993). The Advisory Committee expressly indicated that the ten-per-side deposition  
20 limit applies to multi-party cases, such as the present, and can only be lifted by stipulation or  
21 court approval. Fed.R.Civ.P. 30 Advisory Committee's Note (1993) ("In multi-party cases,  
22 the parties on any side are expected to confer and agree as to which depositions are most  
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1 needed, given the presumptive limit on the number of depositions they can take without leave  
2 of court.”).

3 This Court has been unable to identify a single instance in which a court has deviated  
4 from interpreting Fed.R.Civ.P. 30 to impose a presumptive ten-per-side limit on the number  
5 of allowed depositions. Defendant has misconstrued the only example that it offers to support  
6 its contention that “[s]ome courts have interpreted this limit to allow ten depositions *per*  
7 *party*.” Dkt. # 114, p. 4. The sole case on which Progressive relies, *Doyle v. Gonzales*, 2011  
8 U.S. Dist. LEXIS 85115 (E.D. Wash. 2011), actually assumes a ten-per-side limit even while  
9 it uses the language “ten per party.” *Id.* at \*13. The court in *Doyle* permitted depositions in  
10 excess of the limit because of the exigencies of the case and after considering the grounds for  
11 extension under Fed.R.Civ.P. 26(b)(2), not because the court was unclear that a ten-per-side  
12 limit presumptively held. *Id.* (“Accordingly, Defendants’ election to pursue this after-  
13 acquired-evidence affirmative defense necessitates allowing Plaintiff to depose more than ten  
14 individuals....”). Courts from within and without the Ninth Circuit have uniformly understood  
15 the rule to impose a ten-per-side limit, including in cases involving multiple parties. *See, e.g.,*  
16 *Smith v. Ardew Wood Products, Ltd.*, 2008 WL 4837216 (W.D. Wash. 2008) (refusing to  
17 expand the number of allowed depositions beyond the allotted ten for multi-party defendants);  
18 *U-Haul Co. of Nevada, Inc. v. Gregory J. Kamer, Ltd.*, 2013 WL 1239702 (D. Nev. 2013)  
19 (conditionally allowing multi-party plaintiffs to exceed the presumptive ten deposition limit  
20 because of a stipulation between parties); *Felman Production, Inc. v. Industrial Risk Insurers*,  
21 2009 WL 3668038 (S.D. W. Va. 2009) (emphasizing in a multi-party case that the ten-per-  
22 side limit “reflects the federal rules’ policy of promoting cost-effective discovery....”).  
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1 As to Progressive's request to expand the number of allowed depositions, this motion  
2 is denied without prejudice and defendant may renew this motion with further information in  
3 support of the necessity of additional depositions. Ordinarily, "[c]onsideration should...be  
4 given at the planning meeting of the parties under Rule 26(f) and at the time of a scheduling  
5 conference under Rule 16(b) as to enlargements or reductions in the number of depositions,  
6 eliminating the need for special motions." Fed.R.Civ.P. 30 Advisory Committee's Note  
7 (1993). As discovery progresses, it will sometimes unveil a need to allow additional  
8 depositions than were contemplated at the initial scheduling conference. *See U-Haul Co. of*  
9 *Nevada*, 2013 WL 1249702, at \*3. Upon such an event, Fed.R.Civ.P. 26(b)(2) allows that "the  
10 court may alter the limits in these rules on the number of depositions or  
11 interrogatories...under Rule 30," keeping in mind the policy reasons embodied in the  
12 presumptive limit.  
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15 In considering whether to extend the limit under Rule 26(b)(2), "the Court will  
16 consider whether: (i) the discovery sought is unreasonably cumulative or duplicative, or is  
17 obtainable from some other source that is more convenient, less burdensome, or less  
18 expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the  
19 action to obtain the information sought; or (iii) the burden or expense of the proposed  
20 discovery outweighs its likely benefit, taking into account the needs of the case, the amount in  
21 controversy, the parties' resources, the importance of the issues at stake in the litigation, and  
22 the importance of the proposed discovery in resolving the issues." *Smith*, 2008 WL 4837216,  
23 at \*1. A party seeking to exceed the presumptive limit bears the burden of making a  
24 "particularized showing" of the need for additional depositions. *Id. See also, Bell v. Fowler*,  
25 99 F.3d 262, 271 (8th Cir. 1996); *Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of*

1 *Minn.*, 187 F.R.D. 578, 586 (D.Minn. 1999). Parties should ordinarily exhaust their allowed  
2 number of depositions before making a request for additional. *See Smith*, 2008 WL 4837216,  
3 at \*1 (explaining that “Rule 30(a)(2)(A) clearly contemplates that a party has already taken  
4 ten depositions before a motion is filed seeking leave of court for a proposed deposition that  
5 would result in more than ten depositions being taken under the rule.”).

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7 Defendant has not met its burden of justifying the necessity of additional depositions  
8 in its pleadings. Progressive merely contends in its motion that defendants require an  
9 additional six depositions “[i]n order to properly conduct discovery, and depose not only  
10 plaintiffs and their experts, but lay witnesses as well...”. Dkt. # 114, pp. 4-5. In its reply,  
11 Progressive -further contends that adherence to the ten-per-side limit would bar defendants  
12 from taking the deposition of all but one lay witness out of the thirty disclosed by plaintiffs  
13 and from taking the depositions of two of the nine experts disclosed by plaintiffs. These  
14 reasons alone are insufficient without further information that would allow the Court to weigh  
15 the benefits and burdens of additional depositions. Defendant has refrained from specifying  
16 the identity of the additional witnesses to be deposed or otherwise distinguishing the  
17 additional depositions from each other and from those already conducted. Defendant has also  
18 refrained from offering any substantive rationale in support of its position that the presence of  
19 multiple defendants in the instant case justifies expanding the number of depositions beyond  
20 the presumptive limit. The Court is accordingly unable to assess whether the additional  
21 depositions would be unreasonably duplicative or cumulative, taking into account the  
22 depositions already taken, or otherwise overly burdensome in light of their potential benefits.  
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### III. Conclusion

The Court hereby clarifies that Fed.R.Civ.P. 30(a)(2)(A) presumptively limits depositions to ten-per-side. Defendant's motion to enlarge the number of allowed depositions is DENIED without prejudice. In light of the Court's clarification of Fed.R.Civ.P. 30, defendant may renew its motion for leave to conduct depositions in excess of the presumptive limit. Defendant should include information sufficient to allow this Court to make a determination under the standards articulated and embodied in Fed.R.Civ.P. 26(b)(2). Given that little time remains before the scheduled deadline for discovery, this Court will also entertain a simultaneous motion to extend the deadline by which these depositions must be completed.

DATED this 13<sup>th</sup> day of September 2013.



RICARDO S. MARTINEZ  
UNITED STATES DISTRICT JUDGE